IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4847 OF 1986

1. Ramu Pandu Gavade, since deceased
by his heirs and L.Rs:
1(a) Shivaji Ramchandra Gavade and ors
2. Dnyanu Pandu Gavade, .. Petitioners.

Vs

1. Ramchandra Vinshnu Kulkarni, since
deceased by his heirs and L.Rs:
1.(b)Govind Ramchandra Kulkarni & ors.. Respondents.

Mr M.L.Patil, for the petitioners.
Mr M.D.Angal, for respondent nos 1(b) to 1(d).

CORAM : D.B.BHOSALE,J.
DATE : 07.10.2006

ORAL JUDGMENT :

1. This writ petition arises from the order dated 28.7.1986 rendered by the learned Civil Judge, Jr.Dn., Islampur, on the application at Exhibit-6 in Regular Darkhast No.193 of 1968. By the impugned order, the application at Exhibit-6 filed by the petitioners-defendants purportedly under section 47 of the Code of Civil Procedure (for short, "CPC"), has been rejected.

2. This litigation has a chequered history. I propose to make a reference to the factual matrix, to the extent as may be necessary and relevant for

adjudication of the questions raised in this petition. The darkhast proceedings, in which the petitioners filed the application at Exhibit-6, arise from the judgment and decree dated 12.10.1968 passed in Regular Civil Suit No.25 of 1968. The said suit was filed by one Ramchandra Vishnu Kulkarni. It appears that Ramchandra Kulkarni died on 5.12.1972. His four sons, viz. Narayan, Govind, Ashok, Hindurao and his wife Kamlabai were brought on record in the darkhast proceedings. Out of the five heirs, Govind, Ashok and Hindurao were brought on record in the present writ petition as respondent nos. 1(b), 1(c)and 1(d). Insofar as respondent nos 2 to 17, the original defendants in the suit are concerned, they have been deleted by the petitioners being not necessary parties for the purpose of deciding the instant writ petition. The suit was instituted claiming relief of joint possession in respect of several properties including the suit agricultural lands bearing Gat No.2238, formerly R.S.No.307/1, 307/2 and 307/3, totally admeasuring two hectors and three Ares, situate at village Kasegaon, Taluka Walve, District-Sangli, herein referred to as "the suit lands".

3. Few admitted facts are as follows. The petitioners are in exclusive possession of the suit

lands. They were party-defendants in Regular Civil Suit No.25 of 1968. The suit was decreed exparte on 12.10.1968. Some of the defendants carried the matter in Appeal and then in the Second Appeal before this court. Both the appeals were dismissed and consequently the decree stood confirmed. The petitioners did not appear in the suit, though were served, nor did they challenge the decree in appeal. The petitioners even did not appear in the appeals filed by the other defendants. Immediately after the suit was decreed on 12.10.1968, Regular Darkhast No.193 of 1968 was filed by Ramchandra Vishnu Kulkarni. However, the execution proceedings remain stayed pending the aforesaid appeals.

4. The case set up by the petitioners is that their father Pandu Gavade was a tenant in all the three suit lands since before 1.4.1957. All throughout the suit lands stood in the name of the original defendant nos 1 and 2, i.e. the deleted respondent nos 2 and 3 in the petition, and their father Pandurang Ramchandra Kulkarni as landlords. The 32-G proceedings under the Bombay Tenancy and Agricultural Lands Act,1948 (for short, "the Tenancy Act") in respect of R.S. Nos.307/1, one of the three suit lands, was initiated and concluded by fixing its purchase price on 31.10.1961. The purchase certificate under section 32M in respect thereof was

also issued on 19.8.1967. It appears that some time prior to 1964 the petitioners'father-Pandu Gavade was illegally dispossessed from the other two suit lands, viz. R.S.Nos 307/2, 307/3 and hence he had to file an application for restoration of possession under section 29 of the Tenancy Act. In 1964 the application for restoration of possession was allowed. That order was carried by defendant nos 1 and 2 in appeal, then in revision and thereafter in Special Civil Application before this court. Defendant nos 1 and 2 lost before all the forums and the possession of R.S.No.307/2 and 307/3 was delivered to the petitioners' father on 14.8.1973. Thereafter, 32G proceedings in respect thereof were initiated and concluded with the issuance of the purchase certificate under section 32M of the Tenancy Act on 25.7.1978. It is against this backdrop, the petitioners claim that they are in possession of all the three suit lands as owners.

5. Regular Civil Suit No.25 of 1968 was filed some time in 1968 and it was decreed on 12.10.1968. After the exparte decree was confirmed in the appeal as well as in the second appeal, filed by some of the defendants in the suit, vide the judgment of this Court dated 21.7.1980, the execution proceedings, bearing Regular Darkhast No.193 of 1968 started moving further. When

the decree was sought to be executed against the petitioners, they made an application at Exhibit-6 under section 47 of CPC on 29.4.1986 contending that the decree is inexecutable being without jurisdiction, as the petitioners have become the owners of the suit lands under the Tenancy Act. This application has been rejected by the executing court by the impugned order dated 28.7.1986 and hence the present petition.

6. At this stage, a reference to an old litigation will have to be made, on the basis of which the respondents-decree holders claim right over the suit lands. The great grand father of original plaintiff-Ramchandra Vishnu Kulkarni, i.e. the father of respondent nos 1(b) to 1(d), one Narayan had five sons. Hari, Ramchandra, Laxman, Ganesh and Govind. Plaintiff-Ramchandra represented the branch of Govind Narayan Kulkarni whereas original defendant nos 1 and 2 represent the branch of Ramchandra Narayan Kulkarni. Hari had three sons - Anant, Yashwant and Krishna. Anant and Yeshwant had filed Civil Suit No.627 of 1918 against the son of Pandurang, i.e. the son of Ramchandra Narayan Kulkarni and Vishnu, i.e. father of the plaintiff-Ramchandra. The decree was passed in the said suit to the effect that the lands would remain in possession of Anant and Yeshwant during their life time

and after their death, would continue to remain in possession of Anandi and Indira, their respective wives during their life time and after their death the lands would revert back to Pandurang Ramchandra Kulkarni and Vishnu Govind Kulkarni. This family had several lands and they all were subject matter of that suit as well as the present suit. The suit lands were also part of the said joint family property. Indira died on 11.5.1953 and Anandi died on 7.12. 1955. After their death, according to Ramchandra, all the properties including the suit lands were reverted to Pandurang Ramchandra Kulkarni and his father Vishnu Govind Kulkarni and that is how he is the joint owner of the property and hence had filed Regular Civil Suit No.25 of 1968 against all the defendants including the petitioners for joint possession.

7. Against the backdrop of the aforesaid factual matrix, two questions have been raised for my consideration in the present writ petition. Firstly, whether in view of the certificate of purchase issued under section 32M of the Tenancy Act, the decree has become inexecutiable and hence the execution proceedings, insofar as the suit lands is concerned, be dropped and/or dismissed and, secondly, whether the writ petition would in its entirety abate since the petition

was initially filed against the dead person and that all the legal representatives of the deceased-plaintiff Ramchandra, who were on record in the execution proceedings, were not added as respondents in this petition.

8. Mr Patil, learned counsel for the petitioners, at the outset, placed heavy reliance upon the judgment of the Apex Court in **Saraswatibai Trimbak Gaikwad Vs Damodhar D Motiwale and ors, (2002) 4 SCC 481**, to contend that in view of the purchase certificate issued under section 32M of the Tenancy Act issued on 19.8.1967 in respect of R.S. Nos 307/1 and on 25.7.1978 in respect of R.S.Nos 307/2 and 307/3, the decree obtained by the plaintiff cannot be executed against the petitioners. He submitted that the petitioners had become the owners of the suit lands on 1.4.1957 by operation of law and, therefore, the decree in respect of the suit lands was without jurisdiction and cannot be executed. He then submitted that the decree of joint possession can only be passed against co-parceners, and not against the petitioners, they being purchasers of the suit lands under the provisions of the Tenancy Act. He submitted that the petitioners have become the purchasers of the suit lands under the Tenancy Act and there is prohibition of transfer of the said lands under

section 43 thereof. If the decree is executed, the possession of the respondents will be unauthorised under section 83A and they would be liable to be evicted under sections 84 and 84C of the Tenancy Act. In other words, he submitted that the decree of joint possession overlooking the tenancy rights of the petitioners is without jurisdiction. In support of his contentions, he placed reliance upon the judgment of the Supreme Court in **Sarwan Kumar and Anr Vs. Madanlal Aggarwal, (2003) 4 Supreme Court Cases 147**. Insofar as the second question raised for my consideration is concerned, Mr Patil submitted that after the petitioners came to know about the death of Narayan, Hindurao and Kamlabai, heirs of deceased plaintiff-Ramchandra, the petitioners made enquiry but they could not find entries in the record of Kasegaon Gram Panchayat, the village of which the family was permanent residence. The efforts to find out the names of the heirs of deceased Narayan, Hindurao and Kamlabai, also were made by writing a letter to the Advocate for respondent nos 1(b) and 1(c) but there was no response and hence he could not bring the heirs of Narayan, Hindurao and Kamlabai on record. However, he submitted that respondent nos 1-B and 1-C, being the surviving heirs, they represented the estate of deceased Ramchandra Vishnu Kulkarni and, therefore, there can be no abatement of the petition, as contended by the other

side. In support of this submission, he placed reliance upon the following judgments: **AIR 1971 SC 742 - Mahabir Prasad Vs Jageram, AIR 1982 SC 948 - Mohammad Arif Vs Allah Rabbul Alamin , AIR 1988 SC 2121 - Collector of 24 Parganaz Vs Lalit Mohan Mallik, 1991 (3) SCC 114 -Suraiyya Begum Vs Mohammad Usman, and 1995 Supp (30 SCC 331 - Bhurey Khan Vs Yasin Khan**.

9. On the other hand, Mr Angal, learned counsel for respondent nos 1(b) and 1(c), submitted that the petition deserves to be dismissed as abated in its entirety as the same was filed against a dead person and also on the ground that the legal representatives of Narayan, Hindurao and Kamlabai, the sons and the wife of the original plaintiff-Ramchandra, were not brought on record. The decree obtained is a joint and indivisible and, therefore, the whole petition abates. In support of this contention, he placed heavy reliance upon the judgment of the Apex Court in **Rajeshwari Amma and anr Vs Joseph and Anr, (1995) 2 SCC 159** and the judgments of this court in **Cheela wd/o Vijay Choudhari and ors Vs Central Bank of India and ors, 1998(1) Mh.L.J. 928** and in **Popatlal Prabhudas and sons Vs. Indu Eletric Industries and anr, 2003(1) Mh.L.J.949**. Insofar as the first question is concerned, he submitted that a challenge to the execution of a decree can be made only

if the decree is void ab initio, i.e. if it has been passed by the court without jurisdiction. An illegal decree can be challenged only by preferring an appeal against it. In the present case, according to Mr Angal, the decree is not void ab initio and, therefore, the principle of nonexecutability of the decree cannot be made applicable in the present case. He took me through the judgment of the trial Court and endeavoured to demonstrate that the fact of tenancy was not brought to the notice of the court either by the petitioners by appearing in the present case or by any other party and hence there was no question of making reference under section 85A of the Tenancy Act, did arise. He, therefore, submitted that once a decree is passed then it has to be executed even if it is an illegal decree and its execution can be challenged only if it is shown that it was void ab initio. In support of this contention, he placed heavy reliance upon the judgment of the Apex Court in **Rafique Bibi (dad) by LRs Vs. Sayed Waliuddin (dead) by LRS and ors , (2004) 1 SCC 287 and Vasudev Dhanjibhai Modi Vs Rajabhai Abdul Rehman, AIR 1970 SC 1475**. He then submitted that the contention raised by the petitioners is hit by the principle of constructive res judicata and therefore the petitioners are precluded from raising any contention with regard to nonexecutability of the decree. He submitted that the

civil court, which passed the decree, did have the jurisdiction to try and entertain the suit. The objection, if any, therefore, ought to have been taken by filing a written statement. Since no written statement was filed, it cannot be said that the decree was without jurisdiction. In other words, it is only when the civil court lacks initial jurisdiction to try and entertain the suit and if it passes a decree then only the decree is void. Such is not a case in the present petition. He, therefore, submitted that the trial Court has rightly rejected the contentions of the petitioners.

10. At the out set, I would like to consider the principal question raised in the petition as to whether, in the face of the facts of the present case, a decree could be executed against the petitioners. A heavy reliance was placed on the Judgment of the Supreme Court in **Saraswatibai's case** (supra), to contend that not only the law laid down by the Supreme Court in this case squarely covers the question involved in the present case, but even the facts and circumstances against which the Supreme Court has laid down the law and the facts and circumstances in the present case are quite similar. In view of the submission, I deem it appropriate to state the facts and circumstances before the Supreme

Court in that case, against which the proposition relied upon by the petitioners has been laid down.

11. The Supreme Court, in **Saraswatibai's case** was dealing with somewhat similar fact situation. In that case one Narayan Motiwale was the owner of certain pieces of land. He had a son named Dattatraya and a daughter named Tarabai. On the death of Narayan Motiwale, Dattatraya became the owner of the properties. By a registered settlement deed dated 12.1.1997, Dattatraya gave survey nos 21/3, 20 and 20/1 to his sister Tarabai as she was poor and unable to maintain herself until her death. Pursuant to the deed of settlement the name of Tarabai was entered in the revenue record as a Kabjedar. She leased out one piece of land to a tenant in 1968. Dattatraya filed suit no.362 of 1969 against Tarabai for a declaration that he was the owner of the land in question and that Tarabai had only a limited interest and therefore could not lease out the land. In the meantime the tenant to whom Tarabai had leased out the land applied for tenancy rights under the provisions of the Tenancy Act. The suit filed by Dattatraya was dismissed. It was carried in appeal and in appeal a consent decree was passed on 7.10.1971. Under the consent decree Tarabai agreed that she will not lease out any piece of land. In the

meanwhile, the tenancy proceedings, which were initiated by the lessee, were concluded and by an order dated 13.3.1971 it was held that the lessee was a deemed tenant under section 4 of the said Act. The Land Tribunal fixed a price under section 32G of the said Act. The price was paid by the lessee and that lessee became the statutory owner of the property. Dattatraya was a party to those proceedings. In 1973 Tarabai filed a suit no.73 of 1973 against Dattatraya claiming that, after coming into force of the Hindu Succession Act,1956, the limited rights vested in her had matured into an absolute right. That suit was dismissed in view of the consent decree passed in Appeal no.450 of 1970. On 19.1.1977 Dattatraya expired. On 6.9.1980 Tarabai executed a lease deed in favour of the appellants. On 7.12.1980 the appellants gave notice under section 32-O of the Tenancy Act to Tarabai and the Land Tribunal. By this notice the appellant indicated her intention to purchase the suit land. Respondent nos 1 and 2 then filed suit no.472 of 1981 against Tarabai and the appellants for a declaration that Tarabai had no authority to lease or create any encumbrance on the suit land. They prayed for recovery of possession. Tarabai expired on 5.3.1982. Thereafter, the suit had proceeded only against the appellants. On 19.2.1986 the trial Court decreed the suit holding, on the basis of the

earlier consent decree, that Tarabai had no authority to lease out the suit land. it was held that the lease in favour of the appellant was not binding on respondent nos 1 and 2. It was held that the appellant was a trespasser. The appellant preferred an appeal and it was allowed on 16.9.1989. Respondent nos.1 and 2 filed a second appeal which was allowed by the High Court on 27.6.1997. On 18.8.1981 the appellants filed a case under section 32-O of the Tenancy Act. Respondent nos 1 and 2 opposed that application. On 22.4.1988, the Land Tribunal fixed the purchase price under section 32G. The appellants deposited the purchase price immediately. Respondent nos 1 and 2 filed an appeal against the order dated 22.4.1988. That appeal was dismissed on 23.11.2000. A certificate of ownership under section 32M of the Tenancy Act has been issued to the appellants on 4.12.2000. The revision preferred by respondent nos 1 and 2against the order dated 23.11.2000 however was pending. It is against this backdrop, respondent nos 1 and 2 had applied for execution of the decree passed in their favour. The appellant had filed an application, in the executing court, under Order 21 Rule 97 of CPC contending that they had already become owners by virtue of the purchase price having been fixed in their favour. The appellants contended that the decree could not now be executed against them. Their application was

rejected on 12.2.1999. It was held that the executing court was bound to execute the decree obtained by respondent nos 1 and 2 in their civil suit. The appellants filed an appeal. That appeal came to be dismissed on 28.6.1999. The appellants preferred a writ petition in the High Court which was dismissed by the impugned judgment dated 23.8.1999. The matter was carried further to the Supreme Court. It is against this backdrop, the question that fell for the consideration of the Supreme Court was whether a decree passed by a civil court can be executed if a certificate of ownership has been granted under the provisions of the Tenancy Act.

12. A plain reading of the judgment in **Saraswatibai** would, thus, show that there is a significant similarity in the facts of the instant case and the facts of the case before the Supreme Court. The only distinguishing factor, which was brought to my notice by Mr Agnal, learned counsel for the respondents, was that the decree holder in Saraswatibai was a party in the tenancy proceedings whereas in the present case the decree holder was not a party to the Tenancy proceedings. It was also brought to my notice in the instant case that at no stage in the civil suit the fact of tenancy was brought to the notice of the court either by the

petitioners or any other party to the proceedings. Defendant nos 1 and 2 were before the civil court as well as before the tenancy authorities. They also did not bring it to the notice of the civil Court. The suit and the tenancy proceedings were progressing simultaneously. However, indubitably the petitioners had succeeded before the first authority much before the suit was decreed.

13. The Supreme Court in **Saraswatibai's** case (supra), after considering the scheme of the provisions of Section 32-O, 32G, 32H, 85 of the Tenancy Act in paragraphs 24 and 25 of the judgment, held thus:-

> "24. Faced with this position Mr.Lalit submitted that in this case, there was a decree, after contest, between the appellant and Respondents Nos.1 and 2. He submits that that decree is binding on the appellant and can be executed against the appellant. We have read the decrees/orders of the civil court. In passing the decree and holding the appellant to be a trespasser the civil court has not considered the provisions of the said Act. The conclusion that the appellant is a trespasser is de hors the right of the appellant under the said Act. Mr. Lalit submitted that the appellant never claimed before the civil court that she was a deemed tenant. He submitted that the appellant could have contended before the civil court that she was a deemed tenant under the said Act. He submitted that as the appellant has not taken this contention before the

civil court she is now debarred from raising a claim under the said Act. We see no substance in this submission. The appellant had already made an application under Section 32-0 before the suit was filed by Respondents 1 and 2. Respondents 1 and 2 were aware that the appellant had made such an application. The appellant was pursuing her remedy under the said Act before the appropriate authority. Respondents 1 and 2 were also parties to those proceedings and were contesting those proceedings. These are not questions which could be raised before a civil court. Therefore, rightly, neither Respondents 1 and 2 nor the appellant took up this question before the civil court. Even if the question had been raised, the civil court could not have decided it. The Civil Court would have had to refer the issue to the appropriate authority and then abide by its decision. **A decree passed without the consideration of the provisions of the said Act must be subject to orders of the appropriate authority in the proceedings under the said Act.**

25. **Thus so long as the certificate stands the decree cannot be executed against the appellant. It is only if Respondents 1 and 2 succeed in getting the certificate set aside, in their pending revision, that they can execute the decree**. It would be open for Respondents 1 and 2 to pursue the revision filed by them against the order dated 23-11-2000. We realise that a revision is on limited grounds. We have noticed that the Appellate Authority dismissed the appeal of Respondents 1 and 2 merely on the ground that this Court had stayed the operation of the decree passed by the civil court. If the revisional authority so desires it may remit the matter back to the Appellate Authority for a decision on merits in accordance with law. We, however, clarify that the decision of the revisional authority or the

> Appellate Authority must be based only on the provisions of the said Act. Findings given by the civil court, dehors the provisions of the said Act, and any observation made by us on that question cannot be taken into consideration in deciding whether the appellant is a deemed tenant.

It may be noticed that almost similar contentions were advanced before the Supreme Court by the learned senior counsel for the appellants therein as are advanced before me by Mr Angal. Submissions of the learned senior counsel for the appellants are more exhaustively quoted by the Supreme Court in paragraphs 19 and 20. In our case, who created tenancy in favour of the father of the petitioners is not clear. It appears that in pursuance of the decree in the civil suit no.627 of 1918, the suit lands remained in possession of Anant and Yeshwant, the sons of Hari Narayan Kulkarni, and after their death Anandi and Indira, the wives of Anant and Yeshwant respectively, got into possession thereof. It is not clear as to who inducted the father of the petitioners, Ramchandra Gawade, as a tenant in the suit lands. The right of either Anant and Yeshwant or their wives to create tenancy, has not been disputed. In any case, the father of the petitioners was not a trespasser on the suit lands and was admittedly holding possession thereof as a tenant. Keeping in view the scheme of the

Tenancy Act, it is clear, as observed by the Supreme Court in **Saraswatibai's case**, the civil court has no jurisdiction to decide matters as contemplated by section 85 of the Tenancy Act which are required to be dealt with by the tenancy authorities. It is also well settled that the civil court has no jurisdiction to decide whether a person is deemed to be a tenant and whether he is entitled to purchase the land held by him. Even if such a question was to be raised in a proceeding before it, the civil court would have to refer the issue to the authorities under the Tenancy Act. The suit would then have to be disposed of in accordance with the decision of the authority. Thus, if the Tribunal fixes a purchase price and issues a certificate then that certificate would be conclusive proof of purchase. The civil court would then be bound to give effect to the certificate and cannot ignore it. In the present case, the question of tenancy and its reference, was not raised at all. But the fact remains that the father of the petitioners claimed tenancy and the purchase price was fixed and even the certificate under section 32M of the Tenancy Act was also issued. The purchase certificate being conclusive proof of purchase the Civil Court would then be bound to give effect to it and cannot ignore it, whether it is a suit or an execution proceedings.

14. Before filing the Regular Civil Suit No.25 of 1968 the petitioners'father in respect of R.S.No. 307/1 had already been declared deemed purchaser. The purchase price in respect thereof was fixed on 30.10.1961 and the purchase certificate under section 32M was also issued on 19.8.1967. It further appears that the proceedings for restoration of possession in respect of R.S. No. 307/2 and 307/3 were initiated much before filing of the suit by Ramchandra and the order for restoration of possession was also passed in 1967 itself. The possession was delivered to the petitioner on 14.8.1973 after disposal of the appeal, revision and special civil application filed by defendant nos 1 and 2 against the order of restoration of possession passed in 1964. No where in the record of rights the name of the plaintiff Ramchandra or his heirs, insofar as the suit lands are concerned, was shown. Admittedly, the names of defendant nos 1 and 2 only were reflecting in the record of rights as landlords of the suit lands. It is against that backdrop, it appears that the tenancy proceedings were initiated only against defendant nos 1 and 2. Though, the civil court had jurisdiction to pass a decree, it cannot be overlooked that the the petitioners had

already become the owners by operation of law. Therefore, merely because the fact of tenancy, the order of restoration of possession and issuance of the purchase certificates was not brought to the notice of civil court does not mean the decree, in our case, could be executed overlooking the purchase certificate under section 32M of the Tenancy Act.

15. Under the provisions of the Tenancy Act, it is imperative for the tenancy authority to give a public notice and serve notices individually on the tenant, his landlord and other persons interested in the land and to record a statement of tenant himself whether he is willing or not willing to purchase the land. The burden is cast on the tenancy authority and not on the tenant to give notice to the landlord. In this case, since the names of defendant nos 1 and 2 only were reflecting in the record of rights, they alone were made parties to the proceedings under section 32-G and section 29 of the Tenancy Act. Defendant nos 1 and 2, who were parties in the suit, also did not bring this fact to the notice of the civil court. It is also clear that since the petitioners had succeeded before the tenancy authorities in getting the price fixed in respect of R.S.No 307/1 and order of restoration in respect of R.S. No.307/2 and 307/3 much before filing of the suit, they did not

appear in the civil suit. It is true that the petitioners ought to have appeared in the civil suit and brought their right in the suit lands to the notice of the civil Court which could have avoided the further litigations including the present petition, insofar as the suit lands are concerned. But such lapse by itself will not entitle respondent nos.1(b) and 1(c) or the other legal representatives of the original decree holder to execute the decree even in respect of the lands of which the petitioners have become statutory owners and in respect of which the purchase certificates under section 32M have also been issued by the tenancy authorities. In my opinion, the judgment of the Apex Court in **Saraswatibai's** case (supra) squarely applies to the facts of the present case and keeping that in view I have no hesitation in holding that so long as 32M certificates stand, the decree obtained by the respondents-plaitniffs, cannot be executed against the petitioners. The judgment of the Supreme court is clear answer to the submissions advanced by Mr Angal, the learned counsel for the respondents.

16. At this stage, I would like to make reference to the judgment of the Apex Court in **Sarwan Kumar's** case (supra). In that case the question that fell for determination of the Supreme Court was as under :

> "Whether a decree for ejectment passed by a civil court qua a commercial tenancy in the State of Delhi before the declaration of law by the Supreme Court in Gian Devi Anand Vs Jeevan Kumar that such a tenancy is heritable, is executable or the judgment-debtors can successfully object to the execution of the decree on the ground that the same was passed by a court lacking inherent jurisdiction and was therefore inexecutable?

While dealing with the question, the Supreme Court considered several judgments including the judgment in **Sushil Kuamr Mehta Vs Gobind Ram Bohra, 9(1990) 1 SCC 193**. The Supreme Court has quoted with approval paragraphs 26 and 27 in **Sushil Kumar Mehta's case** in the said judgment which can be usefully referred to in the present case.

> 26. Thus it is settled law that normally a **decree passed by a court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res judicata in a subsequent suit or proceedings and binds the parties or the persons claiming right, title or interest from the parties.** Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings its validity cannot be questioned. **A decree passed by a court without jurisdiction over the subject-matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent**

> **jurisdiction. It is a coram non judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party.**
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> 27. In the light of this position in law **the question for determination is whether the impugned decree of the civil court can be assailed by the appellant in execution.** It is already held that it is the Controller under the Act that has exclusive jurisdiction to order ejectment of a tenant from a building in the urban area leased out by the landlord. Thereby the civil court inherently lacks jurisdiction to entertain the suit and pass a decree of ejectment. Therefore, though the decree was passed and the jurisdiction of the court was gone into in Issues Nos. 4 and 5 at the ex-parte trial, the decree thereunder is a nullity, and does not bind the appellant. Therefore, it does not operate as a res judicata. The courts below have committed grave error of law in holding that the decree in the suit operated as res judicata and the appellant cannot raise the same point once again at the execution. "
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> (emphasis supplied)

The Supreme Court then in paragraph 20 proceeded to make the following observations;

> 20. In the present case because of the operation of Section 14 of the Act the only authority to pass a decree for

ejectment of the tenanted premises is the Rent Controller appointed under the Act and Section 50 of the Act specifically bars the jurisdiction of the civil court to entertain any suit or proceeding insofar as it relates to the eviction of any tenant from the premises which were covered by the Delhi Rent Control Act. The civil court lacked the inherent jurisdiction to take cognizance of the cause and to pass a decree. Challenge to such a decree on the ground of nullity could be raised at any later stage including the execution proceedings. Tenancy of the building was governed by a special Act and therefore the decree passed by the civil was a nullity and therefore inexecutable. The judgment-debtors had not filed their written statement in the civil court and no issue regarding the Jurisdiction of the civil court to try the suit was framed. The tenant in the special leave petition in this Court raised the contention that the eviction decree passed by the civil court could not be executed against them. This Court refused to go into that question as it was not the subject-matter of the order under appeal. It was left open to the judgment-debtors to raise this ground before the appropriate forum, if available to them under law. **The only forum where the judgment-debtors could raise the objection regarding the executability of the decree was in the execution proceedings which they did. Since the jurisdiction of the civil court was barred, the decree passed by it was a nullity and the judgment-debtors could successfully raise objection regarding the executability of such a decree.** The executing court erred in holding that the judgment -debtors could not raise the objection to the executability of the decree being a nullity having been passed by a court lacking inherent jurisdiction to do so.

Though, I do not wish to record a finding in view of the judgment of the Supreme Court in **Saraswatibai's** case (supra) as to whether the decree is nullity, I find support for the view taken by me based on that judgment, in the decision of the Supreme Court in **Sarwankumar's** case.

17. The judgment relied upon by Mr Angal in **Rafique Bibi's case** (supra), in my opinion, is of no avail to the petitioners in view of the aforestated judgments of the Supreme Court. It is true that in the present case the civil court had jurisdiction to pass a decree in the suit. The suit was filed against 17 defendants including the petitioners in respect of several properties belonging to the joint family. The plaintiffs had sought joint possession in respect of all the properties and, therefore, the decree passed by the civil court insofar as other properties is concerned, cannot be said to be the decree without jurisdiction or void. However, the decree in respect of the suit land, prima facie, appers to be without jurisdiction since the father of the petitioners in respect of one piece of land i.e. 307/1 had already become deemed purchaser and in respect of other two lands, i.e.307/2 and 307/3 also the order of restoration of possession under the

provisions of Tenancy Act was passed much before the filing of the suit. In **Rafique Bibi's** case (supra), it was not the contention of the appellant-judgment debtor therein that the court, which had passed the decree, did not have jurisdiction to do so, as in the present case it was so contended by the petitioners. Even the judgment in **Vasudeo Dhanjibahi Modi's case** (supra) relied upon by Mr Angal would also not apply to the facts of the present case. As a matter of fact, in that case the Supreme Court has clearly observed that mere objection of jurisdiction of this court to pass a decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain the objection as to the validity of the decree even on the ground of absence of jurisdiction. In the present case, the objection as to the jurisdiction of court to pass a decree, appears on the face of the record and requires no examination of the question raised and decided at the trial. In any case, in the face of the objection, it cannot be said that the executing court will have no jurisdiction to entertain the objection. The respondent-decree holders have not disputed the status of the petitioners as tenants. In other words, the purchase certificates issued under

section 32M of the Tenancy Act is a conclusive evidence of the purchase and in view thereof it cannot be said that the objection raised by the petitioners require examination and can be decided only at the trial. In the circumstances, the judgment in **Modi's case** is of no avail and on the contrary it helps the petitioners to contend that they can legitimately raise the objection as to the execution on the ground of the decree being inexecutable for want of jurisdiction.

18. That takes me to consider the second question. There is no dispute that the petitioners had filed an application seeking leave of the court to correct the title of the petition and show the heirs of Ramchandra Vishnu Kulkarni as the respondents. That application was not opposed by the respondents and hence it was allowed and accordingly the amendment was carried out by adding respondent nos 1(b), 1(c) and 1(d) as heirs of the deceased plaintiff-Ramchandra. It may be noticed that Ramchandra died leaving behind four sons, namely Narayan, Govind, Ashok and Hindurao and wife Kamlabai. They all were brought on record in the Darkhast proceedings as legal representatives and had appeared therein. However, when the petitioners made an application seeking to correct the title of the petition, Narayan and Kamlabai had already expired. The

petitioners, therefore, brought Govind, Ashok and Hindurao only on record. Hindurao also died pending hearing of this petition. It is true that the heirs of Narayan, Hindurao and Kamlabai are not brought on record in the present writ petition though they were parties in the darkhast proceedings.

19. It appears that after the petitioners came to know about the death of Narayan, Hindurao and Kamlabai, they made bonafide enquiry to find out the names of their heirs. Petitioner no.1(a) -Shivaji Gawade, has filed affidavit stating that they made inquiry in the Gram panchayat but the entries of their death were not found in the record. It further appears that a letter was also addressed to the advocate for respondent nos 1(b) and 1(c) as contemplated by Order 22, Rule 10-A of CPC seeking the names of the heirs of Narayan, Hindurao and Kamlabai. However, there was no response from the advocate for the respondents. The respondents have not controverted the statements made on affidavit by the petitioner no.1(a) - Shivaji Gawade. I am satisfied that the petitioners did make diligent and bonafide enquiry to find out the names of the legal representatives of the deceased petitioners and after having failed in their efforts, proceeded only against respondent no.1(b) and 1(c) and, in my opinion, that has

not caused any prejudice to the legal representatives, if any, of Narayan, Hindurao and Kamlabai.

20. I find support for the view in the decision of the judgment of the Apex Court in **N.K. Mohd Sulaiman Sahib Vs. Mohd Ismail, AIR 1966 SC 792**. In that judgment, the Supreme Court was dealing with somewhat similar situation and, while so doing, in paragraph 5 of the judgment, made the following observations:-

> 5. ... . It is also settled that, were the defendant in an action dies after institution of the suit, the creditor after diligent and bona fide enquiry impleads some but not all the heirs as legal representatives, the heirs so impleaded represent the estate of the deceased and a decree obtained against them binds not only those heirs who are impleaded in the action but the entire estate including the interest of those not brought on the record : Dava Ram V. Shyam Sundari. This Court at page 1054 observed :
>
> > " The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bonafide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision

> obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record."

> This court has therefore recognised the principle of representation of the estate by some heirs where the defendant dies during the pendency of a suit to enforce a claim against him, and not all the heirs are brought on the record. If after bona fide enquiry, some but not all the heirs of a deceased defendant are brought on the record, the heirs so brought on the record represent the entire estate of the deceased, and the decision of the Court in the absence of fraud or collusion binds those who are not brought on the record as well as those who are impleaded eo nomine. ... ..."

21. It is true that ordinarily the Court does not regard a decree binding upon a person who was not impleaded as party in the proceedings. But to that rule there are certain recognised exceptions. If the petitioners, after diligent and bonafide enquiry ascertains who the legal representatives of the deceased defendant and still can not find out the names of all the heirs not known to them, will ordinarily be held binding upon all persons interested in the estate. The Court will, undoubtedly, investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. The court will also enquire whether there was a real contest in

the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could have put forward. In our case, the respondents have not even remotely suggested that by not impleading the legal representatives of Narayan, Hindurao and Kamlabai the petitioners have played fraud on the court or intended to obtain order by fraud or collusion and that grave prejudice has been caused due to the absence of their legal representatives. Moreover, no special defence or contention was advanced or referred to, which the absent legal representatives could have put forward or it was not even suggested that the legal representatives of deceased parties had any special defence or they were the real contesting parties. As a matter of fact, in my opinion, the right and interest of those who are before the court and those who were not brought on record is common and they were sufficiently represented in this petition. In the circumstances, I have no hesitation in holding that failure to bring the heirs of Narayan, Hindurao and Kamlabai, despite a bonafide and diligent enquiry as to the existence of the legal representatives, would not affect the rights of the plaintiffs in the present writ petition. In any case, the estate of the deceased has been sufficiently represented by respondent nos 1(b) and 1(c).

22. It is against this backdrop, a further reference can be made to the judgments of the Supreme Court in **Mahabir Prasad's** case (supra) and more particularly paragraphs 5 and 6 thereof. The Supreme Court in that case, after considering its judgments in few other cases, held that when a respondent in an appeal dies and one of his legal representatives is already on record, the appeal does not abate even though no application is made to bring them on record. Again in **Mohammad Arif Vs Allah Rabbul Alamin and ors** (supra), the Supreme Court held that if a party already on record sufficiently represents the property of the deceased respondent then there is no necessity of application to bring legal representative of the deceased on record. Then in **Collector of 24 Parganas Vs Lalith Moha Mullick's case** (supra), the Supreme Court, while considering the similar question in the first paragraph of the judgment, held thus:

> "This Review Petition has been instituted on the plea that original respondent No.2 Smt. Sibadasi Mullick, widow of Shri Krishna Mohan Mullick, had died during the pendency of the appeal in this Court and that original respondent No.5 Smt. Kamalini Mu llick, widow of Shri Khirode Mohan Mullick, had also died during the pendency of the appeal in this Court which was disposed of on merits by a Judgment and Order dated February 13, 1986 (reported in AIR

> 1986 SC 622) after hearing the parties. So far as st. Sibadasi Mullick, widow of Shri Krishna Mohan Mullick is concerned her two sons viz. Lakshmi Kanto Mullick and Nilkanto Mullick were already on record as respondents Nos.3 and 4. Therefore, **the estate of the deceased was sufficiently represented before this Court. So far as respondent No.5 Smt. Kamalini Mullick, widow of Shri Khirode Mohan Mullick is concerned, her son Ramendra Mullick was already on record as respondent No.6. In her case also the estate was sufficiently represented**. Under the circumstances it is not possible to uphold the plea that the appeal had abated and the judgment on merits rendered by this Court on February 13, 1986 requires to be set aside on this ground."

In **Bhurey Khan's case** (supra), again while dealing with somewhat similar situation, the Supreme Court in paragraph 4 of the judgment held thus:

> "We have heard the learned counsel for the parties. After the order if missing the appeal for non-prosecution was set aside by this Court the parties were relegated to the position as it stood earlier, namely, that the substitution application filed by the appellant for bringing on record the legal representatives to whom the notices were issued stood dismissed. But that could not furnish valid ground for abating the appeal as the six sons of Yaseen were already on record. The estate of the deceased was thus sufficiently represented. If the appellant would not have filed any application to bring on record the daughters and the widow of the deceased the appeal would not have abated under Order 22 Rule 4 of the Code of Civil Procedure as held by this Court

> in Mahabir Prasad v. Jage Ram [(1971) 1 SCC 265 : AIR 1971 SC 742]. The position, in our opinion, would not be worse where an application was made for bringing on record other legal representatives but that was dismissed for one or the other reason. Since the estate of the deceased was represented the appeal could not have been abated."

23. In the present case, it is true that all the heirs were not brought on record. However, it cannot be said that the estate of the deceased Ramchandra was not represented by respondent nos 1(b) and 1(c). Mr Angal, learned counsel for the respondents, placed heavy reliance upon the judgment of the Supreme Court in **Rajeshwari Amma's** case (supra). In that case, the execution petition was filed by Rajeshwari Amma, Sukumara Pillai and Neelamma Pillai, the legal representatives of the deceased Kolappa Pillai. After the execution was ordered by the court vide order dated 12.8.1981, the respondents carried it in revision to the High Court. Therein only the deceased Kolappa Pillai, Rajeshwari Amma and Sukumara Pillai were impleaded as respondents omitting Neelamma Pillai. The decree was already executed and the possession was taken by all the three including Neelamma Pillai. However, the challenge in revision was only against Rajeshwari Amma and Sukumara Pillai. The execution petition being of the

same property which was undivided between the decree-holders, the question as to abatement of the proceedings to its entirety was under consideration and it was held that since the order of delivery of possession in favour of the decree-holders is common and inseparable and since it has become final as against Neelamma, the High Court was not right in setting aside the order as against the appellants, i.e. Rajeshwari and Sukumara. That is not the case in the present writ petition. In the present writ petition, admittedly, the petitioners are in possession of the suit lands exclusively and the question was whether the heirs of the plaintiff Ramchandra are entitled to execute the decree of joint possession as against the petitioners. It is against this backdrop, I have no hesitation in holding that the suit lands were sufficiently represented before this Court by respondent nos 1(b) and 1(c). The Judgment of the Division Bench in **Sheela Vijay wd/o Vijay Choudhari's case** (supra) is also of no avail. Moreover, in that case, admittedly, the Court held that the plaintiff shall be entitled to recover the amount from several defendants who were jointly and severally liable to pay the said sum to the plaintiff. It is thus clear that the decree was joint, inseparable and indivisible and, therefore, the Division Bench took the view that deletion of one of the defendants has

proved to be fatal to their appeal and the appeal in its entirety had abated. Similarly, in **Popatlal Prabhudas and sons' case** (supra) the petitioners were assailing indivisible and inseparable orders passed against the original respondent and the petition was dismissed against few heirs for not removing office objections. It is against this backdrop, learned Single Judge held that the whole petition abates. In the present case, the suit lands are admittedly in possession of the petitioners and respondent nos 1(b) and 1(c) were representing the property of the deceased, viz. the suit lands and, therefore, the petition cannot be said to have abated in its entirety.

24. In the result, the writ petition is allowed and I hold that as long as the purchase certificates under section 32M of Tenancy Act stand, the decree obtained by the respondents-decree holders cannot be executed against the petitioners. Rule is made absolute. No costs.

(D.B.BHOSALE, J.)